

- APC's experimental license is for Washington/Baltimore -- it in fact has conducted extensive experiments in both BTAs, and now has CDMA PCS systems operating in both areas -- and APC's pioneer preference request was for Washington/Baltimore.

Washington and Baltimore simply are two parts of a single market, and any license issued to a pioneer in this area legitimately should reflect this reality.

The portion of any MTA that remains after a grant to a pioneer could be auctioned either as separate BTAs or as an integrated whole.^{31/} The pioneer likely would bid for these remaining markets to create a service area that conforms to the demands of the wireless marketplace -- the geographically consolidated cellular carriers against which pioneers will compete today offer MTA-size service areas to their subscribers. But pioneers will not be the only bidders seeking these licenses. In the Washington/Baltimore MTA, for example, areas that would be available for bid would include Charlottesville, Virginia; Ocean City, Maryland; and Hagerstown, Maryland -- all valuable PCS markets in their own

a PCS service that did not include coverage to Baltimore would be perceived as a limited service (like CT-2) because of its partial coverage of the market. Consumers consistently rejected limited PCS services in favor of wide-area coverage services like broad-vision PCS and cellular.

^{31/} Auctioning the remaining six 30 MHz BTA licenses in the Washington/Baltimore MTA rather than one MTA license, for example, would be simplicity itself compared with the task of auctioning some 2,500 licenses for PCS generally.

right.^{32/} This would be the case in other MTAs as well.^{33/} This approach thus would permit the Federal government to realize significant revenues from portions of MTAs that are not granted to pioneers.

For these reasons, the Commission should proceed promptly to define preference territories in a manner that takes into account the economic viability of the markets in question and to free the pioneers to launch the services that promise so many benefits for the American economy and quality of life. To delay further will impede the roll-out of

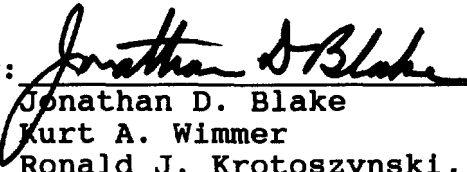
^{32/} Although cellular and PCS will be different in both service and valuation, it should be noted that cellular markets comprising portions of BTAs 156 and 149 (Madison and Frederick, Virginia) were sold in December 1990 for between \$120 and \$135 per pop.

^{33/} Even if pioneers do not obtain these licenses, they would establish alliances with other licensees in that MTA to develop facilities-sharing, cost-cutting and wide-area design arrangements that will maximize coverage and minimize consumer pricing throughout the MTA as a whole. Competitive pressures will ensure that these arrangements are made quickly and fairly.

American PCS equipment and impair our already delayed ability to compete internationally.

Respectfully submitted,

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ATTACHMENT A

THE COMMISSION MAY NOT LAWFULLY APPLY MODIFICATIONS OF ITS PIONEER'S PREFERENCE POLICY RETROACTIVELY

In the Notice, the Commission suggests that it might apply any changes in its preference policy to tentative preference grantees. Notice, at ¶ 19. However, the Commission does not have the legal authority to modify its preference policy retroactively absent express congressional authorization. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Motion Picture Ass'n of America v. Oman, 969 F.2d 1154, 1156-57 (D.C. Cir. 1992) ("MPAA"); see also 5 U.S.C. § 551(4) (a "rule" is an "agency statement of general or particular applicability and future effect").

The Commission undoubtedly is entitled to alter or amend its preference policy prospectively. However, eliminating or minimizing the pioneer preferences that have been tentatively granted as a result of extensive work by PCS innovators (like APC) would constitute the impermissible retroactive application of a new rule. A substantive modification of the pioneer preference policy, if applied to tentative grantees, would impair preexisting rights acquired under the Commission's current rules, and would therefore be unlawful. See Bowen, 488 U.S. at 208-09; MPAA, 969 F.2d at 1156.

Among many other contributions, APC pioneered new technologies that will enable PCS to coexist with incumbent fixed microwave systems, and thereby made PCS possible. APC undertook these efforts on the understanding that it could be

awarded a preference under the standards set forth in rule 1.402. To date, the Commission has evaluated APC's efforts under these standards, and has tentatively concluded that APC satisfied them. See Amendment of the Commission's Rules to Establish New Personal Communications Servs., 7 F.C.C. Rcd. 7794, 7797-99 (1992).

Now, the Commission proposes to modify the standards used to evaluate preference applicants, and perhaps abolish the program entirely. Notice, at ¶¶ 7, 19. Clearly, application of new standards to APC (or abolition of the entire program) would constitute an ex post facto modification of the Commission's preference rules.

Simply put, Bowen prohibits the Commission from modifying the standards used to finalize APC's preference without explicit congressional authorization. APC completed all that was required of it to obtain a preference well in advance of August 6, 1993; APC had no control over the Commission's delay in finalizing the tentative preference.^{1/} As of November 1992, APC had a vested right to have its preference request finalized under the rules and standards then in effect. Bowen, 488 U.S. at 208-12; see also id. at 217-19 (Scalia, J., concurring) (explaining that under the

^{1/} Thus, APC and the other tentative grantees hold a "vested" right to a preference decision based on the criteria in effect prior to passage of the auction legislation. See Association of Accredited Cosmetology v. Alexander, 979 F.2d 859, 864 (D.C. Cir. 1992).

APA, new administrative rules may only be applied to future cases).

Based on the Commission's public pronouncements, APC and the other broadband PCS pioneers simply had no reason to believe that the promulgation of auction legislation would in any way affect their ability to obtain a pioneer's preference; they reasonably relied on the Commission's ongoing reassurances that the preference program would be continued.^{2/} See Amendment of the Commission's Rules to Establish New Personal Communications Servs., 7 F.C.C. Rcd. 5676, 5733, 5763-69 (1992); compare id. at 5732-33 (discussing preferences without mentioning or in any way intimating that the Commission would abolish its preference program retroactively if the Congress passed auction legislation) with id. at 5763-69 (discussing possible use of competitive bidding to award PCS licenses). The Commission should recognize the substantial reliance that APC and other broadband PCS innovators placed on its current preference rule, acknowledge

^{2/} The Commission has previously faced the question of whether to apply changes in the preference program retroactively. When the Commission amended its preference rules to require the filing of a petition for rulemaking as a prerequisite to a preference request, it did not attempt to apply its revised rules retroactively, and permitted parties relying on its prior rule to continue pursuing their preference applications. See In the Matter of Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 7 FCC Rcd 1808, 1810 & 1810 n.4 (1992). The Commission should do the same in this instance.

that it encouraged this reliance, and, in consequence, not attempt to rewrite its preference rules retroactively.^{3/}

In sum, the Commission's proposed course of action regarding tentative preference grantees is inconsistent with the teachings of Bowen. More fundamentally, it would deny a benefit to innovators who did everything that the Commission required of them to obtain the benefit during the time period when the Commission's rules unquestionably provided for the issuance of pioneer's preferences. APC respectfully submits that in these circumstances, the Commission cannot lawfully apply any changes in its preference policy to holders of tentative preference grants. Bowen, 488 U.S. at 208-09; MPAA, 969 F.2d at 1156.

^{3/} Indeed, the Commission has tentatively concluded that it would be inequitable to revisit the issuance of the VITA and Mtel preferences. Notice, at ¶ 18. With all due respect, it would be every bit as inequitable to refuse to finalize preferences that were tentatively granted. This is particularly true in the case of APC -- APC consistently undertook its pioneering efforts prior to Mtel; at every critical juncture, APC's efforts preceded Mtel's efforts temporally.

ATTACHMENT B

A DECISION TO REFUSE TO FINALIZE THE TENTATIVE PREFERENCE GRANTS BASED ON THE AUCTION LEGISLATION WOULD BE ARBITRARY AND CAPRICIOUS.

A decision to deny tentative grantees, such as APC, pioneer preferences based solely on the passage of auction legislation would be both unlawful and unfair. Although the Commission is free to treat different parties differently, it cannot draw distinctions arbitrarily and capriciously. See 5 U.S.C. § 706; see Motor Vehicle Mfrs. Ass'n, 463 U.S. 29, 41-43, 57 (1983); see also People of the State of California v. Federal Communications Comm'n, 905 F.2d 1217, 1230-31, 1238-39 (9th Cir. 1990).

Under the Administrative Procedure Act, each agency action is subject to "a thorough, probing, in-depth review," in which a federal court examines the record to ensure that the agency's decision was a reasonable one. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). The reviewing court focuses on whether the agency has established a "rational connection between the facts found and the choice made." Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962). An agency "may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446 (1985). Although the Commission enjoys discretion in awarding pioneer's preferences, see generally 47 C.F.R. § 1.402(a) (1993), it may not exercise this discretion

to modify its preference policy in an arbitrary or capricious manner. 5 U.S.C. § 706(2)(a).

An agency decision is arbitrary and capricious if it relies on factors that "Congress has not intended it to consider." Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. And, although an administrative agency may revise its policies in light of changed circumstances, "the revocation of an extant regulation is substantially different from a failure to act." Id. at 41. "A 'settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.'" Id. at 41-42 (citation omitted). In consequence, "an agency changing its course by rescinding a rule is obliged to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." Id. at 42; see also International Ladies' Garment Workers' Union v. Donovan, 722 F.2d 795, 812-15, 828 (D.C. Cir. 1983).

In the Notice, the Commission does not propose to revisit the substance of APC's contributions to the development of PCS. Notice, at ¶ 19. The Commission is not questioning the quality or quantity of APC's contributions; a refusal to confirm APC's preference therefore could not be justified as a revised view of its merits. Instead, the Commission suggests that the passage of the competitive

bidding legislation may entirely preclude the continuance of its preference policy.^{1/} Notice, at ¶¶ 19, 21.

The plain language of section 309(j) of the Communications Act establishes that the Commission enjoys continuing authority to maintain its preference program. 47 U.S.C. § 309(j)(6)(G). "[A]rguments as to the general intent or mindset of Congress cannot overturn the clear language of a new provision." American Federation of Labor v. Donovan, 757 F.2d 330, 344 (D.C. Cir. 1985). Thus, the Commission cannot rationally claim that the new policies adopted by Congress preclude the Commission from finalizing APC's preference.^{2/}

Perhaps more fundamentally, the auction legislation does not alter or remove the difficulties that innovators face

^{1/} Some may argue that the Commission should abolish its preference program because the issuance of preferences will reduce auction revenue. However, Congress has clearly provided that maximizing revenue is not a permissible consideration when implementing competitive bidding. 47 U.S.C. § 309(j)(7)(B) (1993) ("the Commission may not base a finding of public interest, convenience, or necessity on the expectation of Federal revenues from the use of a system of competitive bidding under this subsection").

^{2/} Moreover, the new regime of competitive bidding is not a novel or unexpected development. The Commission's pronouncements in the PCS dockets have expressly noted the possibility of issuing PCS licenses at the same time they affirmed the availability of preferences. See Amendment of the Commission's Rules to Establish New Personal Communications Services, 7 F.C.C. Rcd. 5676, 5732-33, 5763-69 (1992). Likewise, the Order finalizing Mtel's preference explicitly noted that auction legislation was pending and did not address license selection issues at all because that legislation was being finalized. Narrowband Report & Order, ¶ 1 ("Issues regarding licensee selection procedures and the regulatory status of the service are the subject of legislation actively being considered by the Congress and will be addressed by the Commission in a further action.").

in obtaining licenses and bringing their ideas to market -- difficulties that led the Commission to initiate its preference program in the first place.^{3/} Because the auction legislation does not require the Commission to abandon its preference program, and because the auction legislation has not removed the impediments innovators in the communications field must overcome, a decision to withhold APC's preference would be arbitrary and capricious, especially in light of the substantial, induced reliance interests that have arisen. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 41-44, 57; People of the State of California, 905 F.2d at 1238-39.

A decision to deny broadband PCS preferences would be viewed in conjunction with the decision to honor a preference for narrowband PCS. The record shows without question that the sole distinction between broadband and narrowband PCS is that the Commission decided to issue decisions in the narrowband portion of the PCS docket more quickly than it issued decisions in the broadband portion of the same docket.

In sum, the Commission cannot credibly assert either that the auction legislation compels it to deny tentative grantees their preferences or that differential treatment of

^{3/} See Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 6 F.C.C. Rcd. 3488, 3492 (1991) (noting need to provide licenses to innovators); Establishment of Procedures to Provide a Preference to Applicants Proposing an Allocation for New Services, 5 F.C.C. Rcd. 2766, 2766-67 (1990) (noting need to provide incentives for invention in the communications field).

broadband and narrowband PCS preferences is rational. The reasons advanced in the Notice do not and cannot justify the radically different treatment contemplated for APC relative to Mtel. In consequence, the Commission should finalize APC's tentative grant.